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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-518

GEORGIA COUCH, ADMINISTRATRIX OF THE ESTATE OF OTIS O. COUCH, DECEASED,
Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a corporation.
Respondent.

PETITION FOR REHEARING ON COURT'S ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, pursuant to Rule 58(2) of this Court respectfully prays that the Court reconsider its order entered on January 10, 1972, in the above captioned case denying petitioner's petition for a writ of certiorari. Petitioner submits that the Court has overlooked or misapprehended the force and effect of the landmark case of *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, as indicated in the opinions of Justice Douglas and Justice Brennan.

REASONS FOR GRANTING PETITIONER'S PETITION FOR REHEARING

The effect of this decision is to overrule by implication *Rogers* v. *Missouri Pacific Railroad Co.*, supra, which has guided the lower courts since 1957. The very recent case of *Riggs* v. *Penn Central Railroad Company*, 442 F.2d 105 (1971) reaffirmed *Rogers*, stating:

> "The evidence need only be enough to justify a jury's determination that employer negligence had *played any role* in producing the harm."

STATEMENT OF POINTS OF LAW OVERLOOKED OR MISAPPREHENDED

Whether a jury question was presented by the evidence bearing on the adequacy of respondent railroad's repair and maintenance practices.

ARGUMENT AND AUTHORITIES

The Court's decision leaves standing a state court's opinion resting on the premise that even admitting the railroad's negligence—

> "That Mr. Couch would choose to do the work in such a manner could not reasonably have been foreseen by the railroad." (A-13)

This is the language of common law proximate causation condemned in the *Rogers* decision.

> "That is the language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury."
>
> *Rogers* v. *Missouri Pacific Railroad Co.*, supra, at p. 506.

Justice White was careful to point out in the court's opinion contained in *Gallick* v. *Baltimore and Ohio Railroad Company*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618, that—

> "- - - Reasonable foreseeability of harm is an essential ingredient of Federal Employers Liability Act negligence. (citations) But this requirement has been satisfied in the present case *by the jury's findings of negligence in maintaining the filthy pool of water.* Thus, when the jury found these facts - - - it is clear that the jury concluded that respondent should have realized the *increased likelihood of an insect biting petitioner while he was working in the vicinity of the pool.*"

Similarly, in *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511, the respondent argued that it was not reasonably foreseeable that petitioner would utilize a knife to loosen the ice cream. The court held:

> "- - - the jury - - - could conclude that petitioner had been furnished no safe tool to perform his task. *It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident.*"

This court has condemned a state court appellate tribunal for substituting its judgment for that of a jury.

> "It (Appellate Court) could not properly substitute its judgment for that of the jury and decide as the Supreme Court of Utah did here that 'it seems quite inescapable that it was (petitioner's) own conduct - - - that resulted in his regrettable injury.' "

Dennis v. *Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed. 2d 256.

The opinion of the lower court can only be read to stand for the proposition that—

> "The risk of injury from overlifting, overstraining or overexerting oneself in an employment is a risk assumed by the employee who is a much better judge of his own strength than the employer."
>
> 35 Am.Jur., Sec. 299, p. 723.

This common law fiction cannot be engrafted by implication onto a statutory cause of action provided by the Federal Employers Liability Act. On the contrary, cases tried under the federal act are to be handled as though "*no doctrine of assumption of risk ever existed.*" *Tiller* v. *Atlantic Coast Line Railroad*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610.

Justice Black, in *Tiller*, another cornerstone decision under the Federal Employers Liability Act, traced the historical development of the law under the Act. In his perceptive treatment of the subject he noted—

> "In the disposition of cases like plaintiff's, assumption of risk has frequently been treated simply as another way of appraising defendant's negligence."

In *Tiller*, the lower court stated:

> "Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business—."

Under such an interpretation of the Federal Employers Liability Act, the judiciary is placed in the role of determining, presumably by reason of its greater wisdom, factual issues wherein ordinary risks are distinguished from

unusual risks in the operation of a railroad. Justice Black made it clear in *Tiller* that such a result was not intended by Congress.

The Court's opinion in this case cannot be reconciled with the opinions and constitutional views of prior members of this Court, including Justice Black. Chief Justice Burger has attested to Justice Black's prolific and erudite contributions of this Court, stating:

> "Throughout his entire life he never wavered in his unbounded faith in the people and in the political processes of a free people under the American Constitution. He loved this court as an institution and *contributed mightily to its work, to its strength, and to its future.*"
>
> Speech by Chief Justice Burger, Oct. 4, 1971.

Petitioner submits that the 7th Amendment guarantees the right of trial by jury. Justice Black's past contribution to the law of the Federal Employers Liability Act should be respected and applied in this case.

CONCLUSION

To leave standing the lower court's opinion in this case is to adopt the view of dissenters in prior landmark cases under the Federal Employers Liability Act. As one dissenter stated:

> "This is a run of the mill negligence case, presenting no new question of law or departure from established legal principles. The only question is whether there was enough evidence to take the case to the jury.
>
> "A total of 12 New York judges - - - have held that the evidence was not sufficient to warrant submission of the case to the jury. To bring such a case here for

> further review by nine more justices seems to be a most futile expenditure of judicial time."
>
> *Basham* v. *Pennsylvania Railroad*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80, Dissenting Opinion.

To categorize an action under the Federal Employers Liability Act as a "run of the mill negligence case" has been repeatedly held to be erroneous by this Court. Common law concepts of negligence blend negligence and assumption of risk. When Congress removed assumption of risk from the Act, it intended that cases tried under the Act should be uniformly handled as if no doctrine of assumption of risk had ever existed.

Petitioner is not unmindful of the heavy burden of litigation being imposed on this Court. Numerous cases involving state court misdemeanor convictions have occupied the valuable time of this Court. Petitioner submits that the judicial process whereby a litigant is deprived a valuable property right, to-wit, $60,000, by a state court construing federal law, should likewise be worthy of review by this Court.

Wherefore, petitioner respectfully prays that the Court grant certiorari and reverse the judgment of the Oklahoma Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition for rehearing were deposited in the United States Post Office with air-mail postage prepaid, addressed to Rainey, Flynn, Welch, Wallace, Ross & Cooper, 735 First National Building, Oklahoma City, Oklahoma; Joseph G. Ralls, 105-1/2 N. Penn, Atoka, Oklahoma, and Lloyd W. Jones, 6703 Del Norte, Dallas, Texas.

This 26th day of January, 1972.

PAYNE RATNER

CERTIFICATE OF COUNSEL

The undersigned counsel, one of the counsel of record for petitioner, certifies that the foregoing Petition for Rehearing is presented in good faith, not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court of the United States.

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